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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 298

STOCKHOLDERS OF THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND,

Appellants,

vs.

JOHN J. GHINGHER, BANK COMMISSIONER FOR THE STATE OF MARYLAND, RECEIVER FOR THE PEOPLES BANKING COMPANY OF SMITHSBURG.

No. 299

STOCKHOLDERS OF THE HAGERSTOWN BANK AND TRUST COMPANY,

Appellants,

vs.

JOHN J. GHINGHER, BANK COMMISSIONER FOR THE STATE OF MARYLAND, RECEIVER FOR THE HAGERSTOWN BANK AND TRUST COMPANY,

Appellee.

To the Honorable the Judges of Said Court:

This, the petition of the appellants in the above entitled causes, respectfully represents:

1. That heretofore, to wit, on the 13th day of July, A. D. 1936, your petitioners presented unto his Honor, Carroll

T. Bond, Chief Judge of the Court of Appeals of Maryland, petitions praying for the allowance of appeals to this Honorable Court in the above entitled causes and at the same time presented unto said Judge a Statement in each of said causes showing the jurisdiction of this Honorable Court.

2. That said Statements conformed with paragraph 1 of Rule 12 of this Honorable Court as the same was constituted prior to July 1, 1936, but did not conform with said Rule as amended because your petitioners were in ignorance of said amendments.

Wherefore your petitioners pray leave to file a consolidated amended Statement in conformity with paragraph 1 of Rule 12 as amended.

Respectfully submitted,

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Appellants,

vs.

JOHN J. GHINGHER, BANK COMMISSIONER FOR THE STATE OF MARYLAND, RECEIVER FOR THE HAGERSTOWN BANK AND TRUST COMPANY,

Appellee.

CONSOLIDATED AMENDED STATEMENT OF APPELLANTS, STOCKHOLDERS, AS TO JURISDICTION.

These are appeals by certain stockholders of the Peoples Banking Company of Smithsburg and of The Hagerstown

Bank and Trust Company, under Section 237 (a) of the Judicial Code (as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, the Act of January 31, 1928, c. 14, 45 Stat. 54, and the Act of April 26, 1928, c. 40, 45 Stat. 466), from final decrees of the Court of Appeals of Maryland, being decisions in favor of the validity of a certain statute of said state in suits in which the validity of said statute had been drawn in question on the ground of its being repugnant to the Constitution of the United States.

Peoples Banking Company of Smithsburg, Maryland.

The Peoples Banking Company of Smithsburg was incorporated under the general corporation law of Maryland on January 24, 1910, and operated as a going banking business from shortly after said date until June 29, 1931, when it closed its doors and ceased active operation of its business. At least three hundred forty-five shares of the capital stock of said bank were acquired by some of the appellants herein prior to June 1, 1910, the effective date of Section 72 of Article 11 of the Code of Maryland hereinafter referred to, which said shares have ever since been held and owned by said appellants (R. 17). The charter of said bank (R. 21) authorized it to conduct a general banking business but did not authorize it to, and it never did, act as fiduciary or exercise any trust powers. On May 5, 1933, in proceedings instituted by the State of Maryland against the said Peoples Banking Company of Smithsburg on the equity side of the Circuit Court for Washington County, Maryland, in proceedings designated on the docket of said Court as No. 12,277 Equity John J. Ghingher, Bank Commissioner, was duly appointed receiver for said bank (R. 3). On June 19, 1933, the said receiver filed a petition in said proceedings asking that the court pass and the court thereon passed, an order assessing the stockholders of record of said bank, under the purported authority of

the provisions of Section 72 of Article 11 of the Annotated Code of Public General Laws of Maryland, 1924 Edition, Vol. 1, page 346 (R. 3-7), 100 per cent of the par value of the shares of stock of said bank held by them respectively.

For some years prior to the closing of said Bank its capital was represented by 4000 shares of stock of the par value of ten ($10.00) dollars each. The stockholders who intervened in the original proceeding in the Circuit Court for Washington County, Maryland, and who are prosecuting this appeal number approximately 130 and own more than one half of the capital stock of said Bank. This appeal, therefore, involves the question of the nature and extent of the liability of the appellants on their respective shares of bank stock.

On February 15, 1935, the appellants herein filed petitions in the Circuit Court for Washington County, Maryland, praying that said order of June 19, 1933, might be rescinded and revoked (R. 7-11). Said petitions assigned as reasons therefor that said Section 72 was unconstitutional and invalid as being contrary to the provisions of the Constitution of the United States, in impairing the obligation of their contracts and depriving them of property without due process of law and that the order of court assessing stockholders imposed upon them a liability different from that contractual liability which they had assumed upon the acquisition of their stock (R. 7-13). And in said petitions said appellants claimed and asserted that they were liable, if liable at all, only for the debts of said bank that were incurred while they were stockholders, and that no stockholder could be rendered liable by reason of his holding stock for debts of the bank created prior to his acquisition of stock (R. 9, 11). Upon a hearing the Circuit Court for Washington County, Maryland, rescinded and revoked its said order of June 19, 1933, saying in part: "The allegations of this petition and the answer of the

Bank Commissioner thereto, raise the question of the constitutionality of Sec. 72 of Article 11 of the Annotated Code, and if it be held constitutional, its proper construction and effect", and by its opinion held that Section 72 was constitutional, but that its proper construction placed upon stockholders liability only for debts of the bank that were incurred while individual stockholders held their stock (R. 27-39).

The receiver appealed said ruling to the Court of Appeals of Maryland and on February 20, 1936, the said Court of Appeals filed its decree in said cause reversing the decree of the Circuit Court for Washington County, Maryland, and by said decree, held that stockholders of record upon the appointment of a receiver were liable for all the debts of said bank and rejected the contention of the appellants that by a proper construction of said Section 72 stockholders were liable only for the debts that were incurred while they were such and said opinion and decree held said act to be valid and constitutional.

The Hagerstown Bank and Trust Company.

The Hagerstown Bank and Trust Company was incorporated by special Act of the Legislature of Maryland in 1902 and began business in June, 1908 (R. 4). It closed its doors and ceased active operation of its business on the 25th day of February, 1933. On December 3, 1934, in proceedings instituted by the State of Maryland against the said Hagerstown Bank and Trust Company on the Equity side of the Circuit Court for Washington County, Maryland, in proceedings designated on the docket of said Court as No. 12777 Equity, a Receiver was appointed by the said Court for the said Hagerstown Bank and Trust Company (R. 1). On the 16th day of January, 1935, the said Receiver filed a petition in said proceedings asking that the Court pass an order assessing the stockholders of said bank under the

purported authority of the provisions of Section 72 of Article 11 of the Annotated Code of Public General Laws of Maryland, 1924 Edition, Volume 1, page 346 (R. 4). On said petition said Court passed an order assessing stockholders of said bank 100% of the par value of their stock provided no good cause to the contrary was shown on or before a day named therein (R. 7). On or before the day named in said order or duly authorized extensions thereof a number of the stockholders of the Hagerstown Bank and Trust Company filed answers showing cause against said order of assessment being made final and in said answers said stockholders assigned as their reasons therefor that said Section 72 was unconstitutional and invalid as being contrary to the provisions of the Constitution of the United States in impairing the obligation of their contracts and depriving them of property without due process of law and also assigned as reasons therefor that the order of Court assessing stockholders imposed upon them a liability different from the contractual liability which they had agreed to upon the acquisition of their stock (R. 8-15). And in said answers said stockholders claimed and asserted that the stockholders of said bank were liable only for the debts of said bank that had been incurred while said stockholders were such and that no stockholder could be rendered liable by reason of his holding stock for debts of the bank created prior to his acquisition of stock (R. 8-15). Upon a hearing, the Circuit Court for Washington County held the cause shown as aforesaid to be good and revoked and rescinded its said order and dismissed the petition filed as aforesaid on the 16th day of January, 1935 (R. 45), and by its opinion adopted the opinion filed in the *Peoples Banking Company* case and held that Section 72 was constitutional, but that its proper construction placed upon stockholders only liability for debts of the bank that were incurred (R. 33-45) while individual stockholders held their stock.

The Receiver appealed said ruling to the Court of Appeals of Maryland and on the 20th day of February, 1936, the said Court of Appeals filed its decree in said cause reversing the decree of the Circuit Court for Washington County, Maryland, and by said decree, held that stockholders of record upon the appointment of a Receiver were liable for all the debts of said bank and rejected the contention of the stockholders that by a proper construction of said Section 72 stockholders were only liable for the debts that were created while they were such and said opinion and decree held said act to be valid and constitutional.

For some years prior to the closing of said Bank its capital was represented by 55,000 shares of stock of the par value of $10.00 each. The appellants herein are the owners of more than 3,500 shares of said stock. This appeal therefore, involves the question of the nature and extent of their liability upon said shares.

The opinions of the Circuit Court for Washington County, Maryland, and of the Court of Appeals of Maryland, hereto appended, show that the proceedings in said respective courts raise the questions of the constitutionality and construction of Section 72 of Article 11 of the Annotated Code of Maryland, hereinafter set forth, and likewise, show that said Court of Appeals held said Section 72 to be constitutional.

Law.

Section 1 of Rule 43 of the Court of Appeals of the State of Maryland provides:

> "SEC. 1. No motion for reargument will be entertained unless a petition, distinctly stating the grounds for the same, be filed within thirty days after the opinion of the Court has been delivered; and no reargument will then be allowed unless a majority of the

Judges who concurred in the opinion consent to it. An opportunity will be given the opposite party to file a reply to such motion, if any member of the Court who concurred in the opinion requests it before the motion is acted on."

Within 30 days from said February 20, 1936, a motion for reargument was filed in said causes, which motions were overruled on the 15th day of April, 1936, and this appeal was applied for and allowed on the 13th day of July, 1936.

The Supreme Court of the United States in the cases of *Morse* v. *United States,* 270 U. S. 151, and *Texas & Pacific Railway* v. *Murphy,* 111 U. S. 488, decided that the three months period in which an appeal to that Court must be taken from the highest court in the State begins to run only after a motion for reargument seasonably filed in the highest court in the State has been denied.

The statute, the validity and construction of which is involved in this appeal is Section 72 of Article 11 of the Annotated Code of Public General Laws of Maryland, 1924 Edition, Vol. 1, page 346 and provides as follows:

"SEC. 72. Stockholders of every bank and trust Company shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of every such corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock. Persons having stock entered on the books of the corporation in their names as executor, administrator, guardian, trustee or pledgee, shall not be personally subject to any liability on such stock, but the one pledging stock, and the estate and funds in the hands of such executor, administrator, guardian or trustee shall be subject to the liability imposed upon the holders of said shares; and the liability of such stockholders shall be an asset of the corporation for the benefit ratably of all the depositors

and creditors of any such corporation, if necessary to pay the debts of such corporation, and shall be enforceable only by appropriate proceedings by a receiver, assignee or trustee of such corporation acting under the orders of a court of competent jurisdiction. Nothing in this section or article shall be construed to repeal or affect the existing rights of creditors or liabilities of stockholders of any trust company under the existing law at the time of the passage or taking effect of this article."

The Constitution of Maryland in force since September 18, 1867, by Section 39 of Article 3 provides:

"SEC. 39. The General Assembly shall grant no charter for Banking purposes, nor renew any Banking Corporation now in existence, except upon the condition that the Stockholders shall be liable to the amount of their respective share or shares of stock in such Banking Institution, for all its debts and liabilities upon note, bill or otherwise; the books, papers and accounts of all Banks shall be open to inspection under such regulations as may be prescribed by Law."

Section 11 of Chapter 206 of the Acts of 1870 of the General Assembly of Maryland (Annotated Code of Maryland of 1888, Sec. 27, Art. 11) provides as follows:

"The continuance of the said several corporations shall be on the condition that the stockholders and directors of each of said corporations shall be liable to the amount of their respective share or shares of stock in such corporation, for all its debts and liabilities upon note, bill or otherwise; and upon this further condition that this Act and every part of it may be altered from time to time or repealed, by the Legislature."

This Act is the general liability act in force, as originally enacted and through successive legislative renewals thereof, from June 1, 1870, until June 1 ,1910, and is the

Act determining the liability of such of the appellants as acquired their stock before June 1, 1910, when this section was repealed and replaced by Section 72 of Article 11 aforesaid. Under said Act of 1870 and the Constitution aforesaid and under many provisions in individual charters of banks substantially identical in language with the aforesaid provision of the Constitution of Maryland and with the provisions of the aforesaid Act of 1870, the Court of Appeals of Maryland in the cases listed below determined the nature of the liability of stockholders of banks to be as follows:

1. The liability of stockholders of banks for the debts thereof is contractual and not penal in its nature.

Norris v. *Wrenschall,* 34 Md. 499;
Coulbourn v. *Boulton,* 100 Md. 350;
Republic Iron and Steel Co. v. *Carlton,* 189 Fed. 130;
Brant v. *Echlen,* 59 Md. 351;
Steel Co. v. *Equitable Society,* 113 Md. 80;
Colton v. *Mayer,* 90 Md. 711;
Hager v. *Cleveland,* 36 Md. 476;
Murphy v. *Wheatley,* 102 Md. 501;
Miners Bank v. *Snyder,* 100 Md. 57;
Basshor v. *Forbes,* 36 Md. 154.

2. The liability of stockholders of banks is a direct liability to creditors and not to the receiver.

Colton v. *Mayer,* 90 Md. 711;
Miners Bank v. *Snyder,* 100 Md. 57;
Murphy v. *Wheatley,* 102 Md. 501;
Hammond v. *Straus,* 53 Md. 1.

3. Creditors could therefore waive said liability by agreement.

Basshor v. *Forbes,* 36 Md. 154;
Murphy v. *Wheatley,* 102 Md. 501.

4. The stockholders liability for the debts of the bank was for such debts and liabilities only as were incurred or contracted by the bank during the particular period each stockholder was such.

Hammond v. *Straus,* 53 Md. 1;
Matthews v. *Albert,* 24 Md. 527;
Norris v. *Wrenschall,* 34 Md. 492;
Hager v. *Cleveland,* 36 Md. 476;
Weber v. *Fickey,* 47 Md. 196;
Miners Bank v. *Snyder,* 100 Md. 57;
Murphy v. *Wheatley,* 102 Md. 501.

5. The stockholders were not liable for debts of the bank incurred prior to their respective acquisition of stock.

Murphy v. *Wheatley,* 102 Md. 501.

6. The stockholder was not liable for debts and liabilities of the bank incurred after he transferred his stock.

Matthews v. *Albert,* 24 Md. 527;
Hager v. *Cleveland,* 36 Md. 476;
Emmert v. *Smith,* 40 Md. 123.

7. But the stockholder, although he transferred his stock, remained liable for the debts of the bank incurred while he was such.

Hager v. *Cleveland,* 36 Md. 476;
Matthews v. *Albert,* 24 Md. 527;
Emmert v. *Smith,* 40 Md. 123.

8. The stockholder had the right to set off against the liability upon his stock what, if any, debts were due him from the bank.

Cahill v. *Original Big Gun Association,* 94 Md. 353;
Strauss v. *Denny,* 95 Md. 690.

The aforegoing Maryland cases established the nature and incidents of the liability of bank stockholders in Mary-

land at least from and after the decision of *Hammond* v. *Straus*, 53 Md. 1, in 1880, until the decision of the Court of Appeals of Maryland in this cause.

The present statutory provision of the law of Maryland imposing liability upon the holders of bank stock is Section 72 of Article 11 aforesaid, which has been in force continuously from June 1, 1910.

The language used to name the stockholders liable and the language used to designate the measure and extent of their liability is substantially identical with the language used in the Constitution and the statutes construed in the Maryland cases set forth above.

Although it is not within the power of the legislature to exempt stockholders of banks from the liability imposed by the provision of the Constitution of Maryland aforesaid (*Mister* v. *Thomas*, 122 Md. 445), the Court of Appeals of Maryland in the instant case has determined:

1. That under said Section 72 there is no contractual liability to creditors, but that the liability of stockholders is an asset of the banking corporation.

2. That stockholders of record at the time of the appointment of a receiver are liable for all of the debts of the bank irrespective of the times said debts were incurred.

3. That stockholders of banks are liable for the debts thereof incurred prior to their acquisition of stock.

4. That the liability of a former stockholder for the debts of the bank is discharged by his transfer of stock.

5. That the stockholder has no right to set off against his liability what, if any, debt is due him from the bank.

Therefore, until the decision of the instant case the nature and incidents of the contractual liability of the appellants were fixed under the Maryland constitutional provision aforesaid to be for different amounts and to different

persons and with various other different incidents than the liability determined in this case to be that of bank stockholders under the present statute.

The decision of the Supreme Court of a State construing and applying its own Constitution and laws generally is binding upon the Supreme Court of the United States; but that is not so where the contract clause of the Federal Constitution is involved. In that case the Supreme Court of the United States will give careful and respectful consideration and all due weight to the adjudication of the State court, but will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that obligation has been impaired; and, likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been effected.

Coombes v. *Getz*, 285 U. S. 434;
Jefferson Branch Bank v. *Skelley*, 1 Black. 436;
Northern Pacific Railway Co. v. *Duluth*, 208 U. S. 583;
King v. *Augusta*, 277 U. S. 100;
Bacon v. *Texas*, 163 U. S. 207;
Louisville Gas Co. v. *Citizens Gas-Light Co.*, 115 U. S. 683;
Wright v. *Nagel*, 101 U. S. 791;
Louisville and Nashville Railroad Co. v. *Palmes*, 109 U. S. 244;
Scott v. *McNeal*, 154 U. S. 34;
Sterns v. *Minnesota*, 179 U. S. 223;
Louisiana Railway and Navigation Co. v. *New Orleans*, 235 U. S. 164;
Huntingdon v. *Attrill*, 146 U. S. 657;
N. O. Water Works v. *La. Sugar Co.*, 125 U. S. 18;
Bridge Proprietors v. *Hoboken Co.*, 1 Wallace 116.

That the liability of the appellants under Section 39 of Article 3 of the Constitution of Maryland is contractual and that this contract is within the protection of the contract clause of the Federal Constitution is established by decisions of the Supreme Court of the United States.

Bernheimer v. *Converse*, 206 U. S. 516;
Hawthorne v. *Calef*, 69 U. S. 10;
Coombes v. *Getz*, 285 U. S. 434.

Under the decisions of the Supreme Court of the United States the obligations of a contract as defined by the "settled law" at the time the contract was entered into (to wit, at the time the stockholder acquired his stock and entered into the relationship with the bank and its creditors) continue to be a part of the contract and the obligation thereof cannot be impaired by any subsequent act of the legislature of the State, or decision of its courts, altering the construction of the law.

Ohio Life Insurance Co. v. *Debolt*, 16 Howard 416;
Piqua State Bank v. *Knoop*, 16 Howard 369;
Louisiana and Nashville Railway Co. v. *Palmes*, 109 U. S. 244;
Louisiana v. *Pilsbury*, 105 U. S. 78;
Coombes v. *Getz*, 285 U. S. 434.

Those stockholders of the Peoples Banking Company of Smithsburg, Maryland, who acquired their stock prior to June 1, 1910 when said Act of 1870 was in effect can be held liable only on the basis of the contract under the law then in force, and it would seem clear that said Section 72 as construed in this cause by the Court of Appeals of Maryland, retrospectively affects said contracts and is unconstitutional as impairing the obligations thereof and as depriving said stockholders of property without due process of law.

Although there is no provision in the Constitution of Maryland concerning the liability of stockholders of trust companies The Hagerstown Bank and Trust Company likewise had banking powers and the liability of its stockholders is therefore equally affected by the Maryland Constitution and statutes set forth above.

It is therefore respectfully submitted that this Honorable Court has jurisdiction of the matters in controversy in these causes.

Respectfully submitted,

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Service acknowledged this 24th day of August, 1936.

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IN THE CIRCUIT COURT FOR WASHINGTON COUNTY

Equity.

No. 12277

STATE OF MARYLAND

vs.

THE PEOPLES BANKING COMPANY.

OPINION OF THE CIRCUIT COURT FOR WASHINGTON COUNTY, MARYLAND.

SLOAN, *C. J.*, and WAGAMAN, *A. J.*:

On the 5th day of April, 1933, the Bank Commissioner was appointed receiver of the Peoples Banking Company of Smithsburg, hereinafter called Bank, and its affairs are now in the hands of the said Commissioner for the purpose of liquidation.

On June 19, 1933, this Court passed an order and decree requiring "each stockholder of the Peoples Banking Company of Smithsburg, Maryland, to pay to John J. Ghingher, Bank Commissioner, receiver for the said" Bank "an amount of money equal to the par value of the share or shares of the capital stock of the said" Bank held by him and further ordering and authorizing the Bank Commissioner to proceed by law with the collection of the assessment so made.

On February 15, 1935, a large number of persons who were stockholders of the Bank at the time of the appointment of a receiver filed their petition praying that they be

made parties defendant in the said proceedings. The prayer of this petition was granted. On the same day these new parties defendant filed their petition praying that the said order of June 19, 1933, be rescinded and revoked. The allegations of this petition and the answer of the Bank Commissioner thereto, raises the question of the constitutionality of Sec. 72 of Art. 11 of the Annotated Code, and if it be held constitutional, its proper construction and effect.

The more material facts appearing from the testimony and stipulation filed in the case are as follows:

The Bank was incorporated under the general provisions of the law on the 24th day of February, 1910. Many of the petitioners were creditors of the Bank at the time of the appointment of the receiver, as well as stockholders. Thirteen of these stockholders were such prior to June 1, 1910, the effective date of the Act of Assembly now appearing in the Code as above stated.

The liability of a stockholder of a corporation to be called upon to pay the debts of the corporation is a liability founded upon contract. *Norris* v. *Wrenschall*, 34 Md. 499; *Brant* v. *Echlen*, 59 Md. 351; *Coulbourn* v. *Boulton*, 100 Md. 351; *Steel Co.* v. *Equitable Soc.*, 113 Md. 80; *Colton* v. *Mayer*, 90 Md. 711; *Republic Iron & Steel Co.* v. *Carlton*, 189 Fed. 130.

In *Norris* v. *Wrenschall, supra*, page 500, it is said in an opinion by Judge Miller, that the stockholder's liability "is not in the nature of a penalty, like that in other sections, imposed upon the trustees, managers, directors or other officers of the corporation, for doing that which the statute expressly or by implication forbids, or omission to do something which the law directs to be done * * * it is * * * virtually and in effect a liability upon a contract and the mutual agreement of the parties, not indeed in form an expressed personal contract, but an agreement of equally binding obligation consequent upon, and resulting from, the acts and admissions or implied assent of the parties." Or, as said by Judge Rose in *Republic Iron & Steel Co.* v. *Carlton, supra*, "In Maryland the liability of a stockholder to a creditor of a corporation is one founded on contract * * * it follows that the plaintiff has a right to insist that the obligation of that contract shall not be impaired by subse-

quent legislation, nor may the State so change the remedy as substantially to impair or lessen the value of the contract."

Since the right of a creditor and the liability of a stockholder is founded on contract, and the contract is a creature either of the Constitution of the State or of valid statutes passed by the Legislature in pursuance of and in accordance with the Legislature's constitutional powers, it is necessary to examine first the constitutional provisions.

Sec. 39 of Art. 3 of the Constitution is as follows:

"The General Assembly shall grant no charter for banking purposes, nor renew any banking corporation now in existence, except upon the condition that the stockholders shall be liable to the amount of their respective share or shares of stock in such banking institution, for all its debts and liabilities upon note, bill or otherwise; the books, papers and accounts of all banks shall be open to inspection under such regulations as may be prescribed by law."

Since the adoption of the Constitution of 1867, there have been but two general statutes dealing with the subject matter of Art. 3, Sec. 39. The first was Sec. 11 of Chap. 206 of the Acts of 1870, appearing in the Code of 1888 as Sec. 27 of Art. 11. The second was Sec. 68 of Chap. 219 of the Acts of 1910, appearing in the present Code as Sec. 72 of Art. 11.

The Act of 1870, Chap. 206, Sec. 11, is as follows:

"The continuance of the said several corporations shall be on the condition that the stockholders and directors of each of said corporations shall be liable to the amount of their respective share or shares of stock in such corporation, for all its debts and liabilities upon note, bill or otherwise, and upon this further condition, that this article and every part of it may be altered from time to time, or repealed, by the Legislature."

This Act is in the identical language of Sec. 39 of Art. 3 of the Constitution, except that it includes the directors as well as the stockholders.

Chapter 338 of the Acts of 1852 authorized the formation of corporations for manufacturing purposes. Sec. 9 of that Act provided, "That all stockholders of every company incorporated under this Act shall be severally and individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company," until the whole amount of capital stock is paid in. In Matthews vs. Albert, 24 Md. 527, the creditor of a manufacturing company sought to recover from a stockholder the double liability under the section quoted. It was held that the stockholder was liable for the debt of the corporation while he was a stockholder, but was not liable to a creditor who became such after his stock had been transferred. This case was decided in 1866.

In *Norris* v. *Wrenschall,* 34 Md. 492, a creditor of a manufacturing corporation sought to recover against a stockholder the double liability under Sec. 52 of Art. 26 of the Code of 1860, being the same statutory provision under consideration in the last mentioned case. The Court said: "We have also there (Norris *v.* Johnson, ante, page 485) determined that the extent of the liability of each stockholder is measured by the amount of stock held by him at the time the debt was contracted, and continues at least until all the capital stock is paid in, and is in no wise affected by the amount thereof that may at any time remain unpaid. There is no provision in the Code by which this liability is made dependent upon any other contingency than the contracting of the debts by the corporation, whilst the defendant was a stockholder, and before the capital stock is fully paid up. These two conditions make the liability determinate and irrevocable."

Hager v. *Cleveland,* 36 Md. 476, was the same character of case as the one last mentioned. The Court says: "This brings us to the second ground of defense; whether the transfer of stock by the appellant, exonerates him from personal liability for a debt contracted when he was a stockholder and before the whole capital stock was paid in."

"The language of Sec. 52, it must be admitted is general in its terms, and does not in words declare whether the in-

dividual liability shall attach to such as are stockholders at the time the debt is contracted, or to those holding stock at the time the suit was brought. It is obvious, however, that the protection of the creditor was the paramount object the Legislature had in view and the section in question, ought to receive such a construction as will best accomplish this object." The Court later quoting from *Norris* v. *Wrenschall, supra,* says: "It is a debt under the statute due from the stockholder to the creditor, springing out of and coexistent with the contract between the corporation and the creditor," (*Colton* v. *Mayer,* 90 Md. 717), and then says: "If so, if it be a debt due from the stockholder to the creditor co-existent with the contract by the company, it is clear that no act by the stockholder without the consent of the creditor can exonerate him from the liability thus incurred. The relation of stockholder creates a perfect legal obligation to pay the debts contracted by the company, and it is upon the faith of this perfect legal obligation that parties deal with the company. The liability of the stockholder, being therefore, in the nature of a contract made between the company, the creditor and himself, we are of opinion that it continues and *is in no manner affected by the mere transfer of his stock.* (Italics ours.) (Court's.) This construction is fully warranted by the language of the statute and best accomplishes the purpose of the Legislature, namely, the protection and security of creditors."

In *Weber* v. *Fickey,* 47 Md. 196, the Court was construing the liability of a stockholder under Sec. 59 of Chap. 325 of the Acts of 1872, the statute being similar to the one in the aforegoing cases. In passing upon a demurrer to the declaration in a suit at law the Court says: "Another defect in the declaration is the omission to allege that the defendant was a stockholder at the time the debt sued for was contracted. It is not sufficient that he should have become one afterwards or was so at some time prior to the date of the credit given, he must have been a stockholder at the time. *Hager* v. *Cleveland,* 36 Md. 476, and this is as essential to the right of recovery against him as the fact that there is an amount of his subscription still unpaid. It is as

necessary to aver the one as the other, and the omission of either averment from the declaration is a fatal defect."

In *Hammond* v. *Straus,* 53 Md., the Court had under consideration the liability of a stockholder of a banking corporation to a creditor of the bank. The provisions of the charter of the bank with respect to this liability are contained in Sec. 14 of Chap. 118 of the Acts of 1874, and are identical in language with the constitutional provisions heretofore referred to, with the addition of "directors" to "stockholders," and with the Act of 1870, Chap. 206, Sec. 11, heretofore referred to. The Court announced, "To entitle the plaintiff (creditor) to recover in this action it was essential that three things should be made to appear: 1. That a corporation, such as that alleged should have been created. 2. That the defendant was a stockholder therein, and 3. That the plaintiff was a creditor of the corporation and that he became such while the defendant was a stockholder," and Judge Boyd said in *Murphy* v. *Wheatley,* 102 Md. 501, 517:

"If depositors and other creditors become such before stockholders occupying that relation to the company they cannot say that they relied on those persons for additional security, or had any right to look to them, for they were not then, and might never become stockholders. But under the rule adopted by this Court, they can if they choose ascertain who the stockholders are when the debts are contracted."

In *Colton* v. *Mayer,* 90 Md. 711, the Court considered the rights of creditors and the liabilities of stockholders under the provisions contained in the Charter of the South Baltimore Bank. The suit was by receivers against a stockholder. The charter fixed the rights of the creditor and the obligations of the stockholder in the identical language of the Constitution, except that it added "directors," to the stockholders. The Court reaffirmed *Hammond* v. *Straus, supra,* and went on to say: "In as much as this charter does not authorize the receivers to sue, the test of their right to do so is to ascertain whether it gave the corporation any property or estate in this liability of the stockholders, or

in any manner made it an asset of the bank, for, unless it did, it is clear that they cannot maintain this suit against the defendant on the mere ground that he was a stockholder. When the charter says, that the stockholders and directors of this corporation shall be liable to the amount of their respective shares of stock 'for all of its debts and liabilities' to whom were they to be so liable? Clearly not to the corporation for its own debts and liabilities, but manifestly they were to be liable to the creditors." And the Court further says: "There was no liability of any kind to the corporation, by reason of this provision in the charter, and at no time from its organization to its dissolution could it have demanded one penny from the appellee on account of it."

Murphy v. *Wheatley,* 102 Md. 501, was a suit to enforce the triple liability of stockholders in a trust company under Section 85L of Article 23 of the Code, Act of 1892, Chapter 109, and it was there held that a stockholder was not liable to a creditor who became such before the ownership of the stock, a liability denied by the Circuit Court. In that case the opinion by Judge Boyd says: "We are aware that many courts—perhaps a majority of those in this Country—have held to the contrary, but the decisions of this Court unquestionably sustain that answer of the lower Court. It is to be regretted if this construction of the statute will cause such difficulties as are suggested by the appellants (of accounting, collection and apportionment), but even such results would be preferable to the risk of doing manifest injustice to those who become stockholders during the closing days of this company. And on page 518, it is said, "The liability, in this respect, is well settled in the State in the earlier cases. They held that the extent of the liability was measured by the amount of stock held by the stockholders *at the times the debts were contracted,* and stockholders were not liable for debts contracted *before* they became such." If this is not the law now, then the stockholders' liability is a penalty and is not contractual. To hold that this liability is a penalty for owning stock the day a bank closes would be not only to overrule the decisions, but to repudiate the interpretation given the consti-

tutional provision (Art. 3, Sec. 39) by Judge Alvey in *Hammond* v. *Straus,* 53 Md. 1, and by Judge Boyd in *Colton* v. *Mayer,* 90 Md. 711.

The cases from which we have quoted, and to which we have referred, firmly establish the principle upon which stockholders are held liable to creditors in Maryland. Some of these cases have considered statutes wherein the language was similar to the language of the Constitution. Others have considered language identical with the language of the Constitution. One of them was decided before the adoption of the Constitution. None of these cases has ever been overruled, nor its authority questioned. From them we think it clearly decided that Sec. 39 of Art. 3 of the Constitution requires the Legislature to give to creditors of banks, and to impose upon stockholders of banks, the following rights and obligations respectively. First. To give to creditors and impose upon stockholders direct and immediate responsibility to be enforced between themselves. Second. To give the creditor the right to pursue a stockholder, and to place upon the stockholder a liability, for the debts of the bank incurred while the stockholder was such. Third. The right of the creditor and the responsibility of the stockholder to continue, notwithstanding the stockholder transfers his stock. And fourth. The liability of the stockholder to be an asset of the creditor and not an asset of the corporation. It does not require the Legislature to impose liability on a stockholder for any debts except those attaching while the stockholder is such.

These rights of creditors against stockholders, which the Constitution requires the Legislature to give them, are property. If these rights are property it is not within the power of the Legislature to take them away. As stated in *Mister* v. *Thomas,* 122 Md. 445-457, "It is not, therefore within the power of the Legislature to have exempted the stockholders of such a corporation from the obligations imposed by Section 39 of Art. 3 of the Constitution." This liability, in order to be unassailable, must be a property right, and if so available to creditors against stockholders who were such when the debt was created. If this is not true then the only alternative is to declare it to be a pen

alty. If a penalty the stockholder, if he sees a bank's failure ahead may rid himself of stock in any way he chooses, no matter what his motive may be, and he can thus free himself of liability. If the transfer be in fraud of any one's right, it must be a property right. There can be no fraud in ridding onesself of a penalty.

It is in the light of these principles, and in that light alone, that we are bound to approach the consideration of Section 72 of Article 11 of the Code.

There is no prohibition in the Constitution against giving creditors of banks rights or imposing upon stockholders obligations greater than required by the Constitution. *Murphy* v. *Wheatley, supra.* But, when we come to consider the only other Act relating to the rights of creditors against stockholders of banks, to wit, Section 72 of Article 11 of the Code, we are bound to assume the Legislature intended to obey the Constitutional Mandate to it; for it would ill become the Court to charge a coordinate branch of the State Government with a wilful disobedience of the will of the people as expressed in the fundamental law. If, therefore, Section 72 of Article 11 of the Code is found to give to creditors the rights, and to impose upon stockholders the liabilities required by the Constitution, it will be no objection to find that it gives greater rights to creditors and imposes greater liabilities upon stockholders. However, if the Section of the Code under consideration is found to give only one right to creditors and impose one liability upon stockholders, then, if by any reasonably possible construction the Act can be held to comply with the Constitutional Mandate, it must be so held. And if the section in question is found to undertake to deny creditors the rights guaranteed to them by the Constitution, it must be held to contravene Section 10 of Article 1 of the Federal Constitution, as well as the Fourteenth Amendment thereto, and in addition thereto the 23rd Article of our own Bill of Rights. *Md. Jockey Club* v. *State*, 106 Md. 413; *Hawthorne* v. *Calf*, 2 Wall. 10-21.

Section 72 of Article 11 of the Code purports to provide but one fund for the benefit of creditors of banks. It purports to impose but one obligation upon stockholders. We

think its provisions can reasonably be construed as complying with the provisions of the Constitution. Any other construction would mean that every State bank organized under the general law would be unlawfully operating because of the absence of the requirement of Article 3, Section 39 of the Constitution. That provision must be fastened on every bank chartered by this State.

The Constitution provides that stockholders shall be liable for "all debts, etc." The Act of 1870 used the same language. The charter in *Hammond* v. *Straus, supra,* repeated it. The statute in *Murphy* v. *Wheatley, supra,* also repeated it. The Charter in *Colton* v. *Mayer, supra,* did likewise. These cases determined that the liability for "all debts, etc." meant debts attaching at the time the stockholders were such irrespective of any subsequent transfer of the stock. When, therefore, the Legislature in 1910 in the section under consideration again repeated the identical language "all debts, etc." which had been given a very definite meaning by the cases referred to, it must be held to have intended the meaning already given it, unless a different meaning is forced by a different context. There is nothing in the Section of the Code under consideration that compels a different interpretation of the language. The "debts" to be benefited by the liability imposed under all the cases were not the debts which might be owing upon the insolvency of the bank. As to each stockholder they were the "debts" attaching during the time he was such.

The "stockholders" to be liable were designated in the charters in the cases cited, as well as in the constitutional provision, by the same language as they are designated in Section 72 of Article 11. The Legislature therefore must have meant the same class of individuals as was determined to be included within that description in the language used in the cases. And "stockholders" as defined in the section must therefore be held to be the stockholders at the time of the creation of the debt for which the liability is sought to be enforced, irrespective of the transfer of their stock.

Not only is there no indication in this section that it was intended to make liable only stockholders of record at the

time of the insolvency of the bank, but it affirmatively appears by the repetition of the language already interpreted as intended not to do so.

Beginning with the Act of 1892, Chapter 109, there are many statutes fixing the liabilities of stockholders of trust, guaranty and other corporations, as to which the Constitution contains no provision. In every one of those Acts the rights of preexisting creditors are reserved. Likewise in Section 72 of Article 11, the preexisting rights of creditors of trust companies are reserved. As to creditors of banks there is no such reservation. As to banks the only previous statute was the Act of 1870, which, as has been said, was in the language of the Constitution. From this failure in the Act of 1910 to reserve the preexisting rights of creditors of banks, the only logical conclusion is that the Legislature did not, by that statute, intend to make any change in those rights; but intended only to provide a different procedure for their enforcement. This view further confirms us in our conclusion that the rights of creditors of banks under the Act of 1910 are identical with those rights under the Act of 1870, and that the Act of 1910 was intended by the Legislature to be construed exactly as was the Act of 1870, except so far as the Act of 1910 provides a different method of procedure.

Section 72 of Article 11 of the Code provides that the liability of stockholders shall be an "asset of the corporation". If by that language it is meant that this liability is for the benefit of all the creditors of the corporation, irrespective of the views we have heretofore expressed, then, in our view, it would be in violation of the Constitutional rights of creditors of the bank. If, on the other hand, it is held to mean that the liability of the stockholder is an asset of the corporation to be distributed by it or its receiver to the creditors according to their rights as heretofore defined, and we so construe it, then it merely provides for a more equitable distribution of the liability imposed for the benefit of creditors, and prevents multiplicity of suits among stockholders for contribution. This construction does no violence to the rights of creditors and the

statute thus construed is not rendered inconsistent with our State or Federal Constitutions.

Miners & Merchants Bank v. *Snyder,* 100 Md. 57.

Mister v. *Thomas,* 122 Md. was decided after the Act of 1910, but the receivers who brought the suit were appointed in 1907. The Farmers Trust, Banking and Deposit Co. for whom the receivers were appointed, were subject to the provisions of the Act of 1904, which was an amendment to Chapters 192 and 279 of Act of 1892, by which the stockholders were bound by Section 11 of the Charter. The order of the lower court directed the receivers to bring suit against stockholders "who would in any way be liable for the debt of the said company". There was nothing in this order limiting the liability to stockholders of record of the day of the receivership, from which it might be inferred that the Chancellor contemplated the possible liability of former stockholders. Nor did the Court of Appeals in the opinion by Judge Burke in terms say it was an asset of the corporation. What he did say (P. 458) was, that it was "to be treated as an asset of the corporation and enforced by the receivers under the order of that Court". The views we have herein before stated are therefore in no way inconsistent with this case.

We have hereinbefore stated that the liability of a stockholder of a bank is an "asset of the corporation" only in the sense that it may be collected by the receiver for the benefit of those creditors who became such while the stockholders against whom the liability is enforced, were such. In so determining we found that Section 72 of Article 11 of the Code, was intended to be a performance by the Legislature of the Constitutional Mandate and no more. It follows as a necessary result that stockholders who are also creditors are equitably entitled to set-off the debt of the bank to them against the stockholders' liability. Such a ruling is necessary to sustain the constitutionality of the statute, and is a reasonable construction of it.

In *Cahill* v. *Original Big Gun Asso.,* 94 Md. 353, the Court allowed the set-off because the charter considered in that case required it. The pertinent provisions of the char-

ter are in the identical language of the Constitution except that "directors" is added to stockholders against which liability is imposed. The Charter considered is the one, the effect of which was construed in *Colton* v. *Mayer, supra. Strauss* v. *Denny,* 95 Md. 690, reaffirmed this decision.

In the discussion of this case we are not unmindful of two recent cases in the Court of Appeals holding stockholders liable to assessment, but neither of them says what stockholders are liable nor for the benefit of what creditors was there such liability. Those cases were heard and decided on the theory of liability, and the constitutional provision was not under attack.

In the case of *Lange* v. *Ghingher,* 168 Md. —, 178A, 116, the question presented and decided was whether the stockholders of the American Trust Company were relieved of their statutory liability because of an agreement whereby management of the bank had been taken over by another bank, with other banks agreeing to share in any shortage in the liquidation of the insolvent bank.

In the case of *Robinson* v. *Hospelhorn,* 168 Md. —, Daily Record June 27, 1935, the decision was that the stockholders' liability was primary, and that the assessment of the stockholders' liability did not need to await the liquidation of the bank's assets and that the assessment was not required to be delayed until the liquidation of the bank's assets by a liquidating corporation to which the assets of the bank had been transferred under an assignment by which it had until July 1, 1938 to convert such assets.

These were the only questions submitted, argued and decided in that case. The questions submitted were so limited by the following stipulation in the record of that case:

"It is intended that all other questions, including the questions of insolvency, *vel non,* and the extent thereof, the status of subscribers to the guaranty fund, and the question as to the liability of particular stockholders for debts created before they became such, or after the bank passed into the control of the Bank Commissioner, and all other relevant questions are reserved for the future determination of the Court, as being unnecessary for present decision".

The fact that it has been the practice under the National Banking Act (U. S. Rev. St. Sec. 5151) to impose this liability upon all stockholders of record of the date of the receivership is neither precedent nor authority in this State. The Constitution of the United States is silent on the subject, and the statute is merely a banking regulation. In 7 *C. J.* 769, Sec. 607, it is said: "This liability is created for the sole benefit of creditors, and is held to arise purely by force of statute and not to be contractual in its nature". In this State the very existence of a bank is contingent upon its being subject to a stockholder's liability in addition to the payment for the stock, and this liability has been declared in all of the cases cited to be contractual in its nature and enforceable in the manner provided. It is not an arbitrary exercise of power by the Legislature, but a contractual obligation, which is a condition precedent to the conduct of a banking business by a corporation. Plaintiff's counsel have cited numerous cases to the effect that this is an arbitrary power in the Legislature, and that the liability is in the nature of a special or trust fund for the security of creditors generally. Our decisions are upon the theory, and they have so construed the language of our Constitution (*Hammond* v. *Straus, supra,* and *Colton* v. *Mayer, supra*), that there is individual responsibility of the stockholder to the creditor who became such during such individual stockholding, and that this liability is not ended by the transfer of his stock, and this is in line with the last clause of the constitutional provision which reads, "The books, papers and accounts of all banks shall be open to inspection, under such regulations as may be prescribed by law", and with what was said by Judge Boyd, already quoted, from *Murphy* v. *Wheatley, supra.*

All irregularities, if any, as to the time and method of presenting to the Court the matters herein considered were waived by the solicitors for the respective parties, and the questions submitted on their merits.

The order and decree of June 19, 1933, will be rescinded and revoked.

IN THE CIRCUIT COURT FOR WASHINGTON COUNTY

Equity.

No. 12777

STATE OF MARYLAND

vs.

HAGERSTOWN BANK AND TRUST COMPANY.

OPINION OF COURT IN CIRCUIT COURT FOR WASHINGTON COUNTY.

SLOAN, *C. J.*, WAGAMAN, *A. J.*:

John J. Ghingher, Bank Commissioner, Receiver of the Hagerstown Bank and Trust Co., filed his petition wherein he states, that it is necessary in the liquidation of The Hagerstown Bank and Trust Co. that an assessment be made against all of the stockholders of that Company in an amount equal to the shares of stock respectively held by them. On this petition an order was passed, requiring each of said stockholders to pay to the said Receiver an amount equal to the par value of the share or shares of the capital stock of said Company held by him, unless cause to the contrary be shown. Notice was also required by said order to be given to each of said stockholders of the substance of the petition, together with a copy of the order. Answers were filed by numerous stockholders, denying the right of the Court to pass such an order. Hearing was had upon petition and answers, and such record evidence offered as was necessary to present the questions on their merits.

The Hagerstown Bank and Trust Co. was incorporated under the name of the Maryland Surety and Guaranty Co. by the Act of 1902, Chap. 298, the Charter amended by the Act of 1904, Chap. 215, and again amended and the name changed to Maryland Surety and Trust Company by the Act of 1908, Chap. 410. Later by amendment, under the general law its name was changed to the Hagerstown Bank and Trust Co.

The Act imposing stockholders' liability on trust companies was Chap. 109 of the Acts of 1892, Sec. 85L. The measure of liability under this section being what is commonly known as triple liability, or an assessment in addition to the par value of shares originally of 200 per cent., which was reduced to a double liability, or an additional 100 per cent by Chap. 101 of the Acts of 1904.

All the legislation which distinguished the liability of the stockholders of banks and trust companies has been repealed, and the Act of 1910, Chap. 219, Code, Art. 11, Sec. 72, is now applicable to both. The result is, there is now no difference as to rights and liabilities of stockholders in the two kinds of corporations.

What has been said in the opinion this day filed in the case of the Peoples Banking Company of Smithsburg, No. 12277 Equity, is equally applicable to the questions presented by the petitions and answers in this case, and the opinion in that case is adopted as the opinion in this.

Anything which was there said with respect to the liability of stockholders, whether they be stockholders of record at the time of the receivership or stockholders who had transferred their stock before the receivership, is, if anything, more clearly said by Chap. 410, of the Acts of 1908, amending the Charter of the Hagerstown Bank and Trust Co., because there is incorporated in that Act these words, "The liabilities of the stockholders shall at all times be determined by the laws of the State in force at the time the said liabilities may attach." This provision is exactly the construction put upon the Constitutional provision Art. 3, Sec. 39, and the statutes passed in pursuance thereof, by the cases mentioned in the opinion of the *Peoples Banking Company* case.

There is no point to any distinction between trust companies engaged in banking business and banks which are not engaged in a trust business. When a trust company engages in or is authorized to engage in and pursues the business of banking it is inescapably bound by the provisions of Sec. 39, of Art. 3, of the Constitution, and whether it be called a bank or a trust company makes no difference if it is engaged in a banking business. The difference in liability under the Act of 1892 was an additional liability put upon banks which engaged in a trust business.

Further discussion of the facts and questions involved in this case, in view of the opinion in the other case, becomes unnecessary and the petition of the receiver filed on the 16th day of January, 1935, will be dismissed.

IN THE COURT OF APPEALS OF MARYLAND

OCTOBER TERM, 1935

GENERAL DOCKET

No. 61

JOHN J. GHINGHER, BANK COMMISSIONER, RECEIVER FOR THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND,

vs.

STOCKHOLDERS OF THE PEOPLES BANKING COMPANY OF SMITHSBURG, MARYLAND.

OPINION OF COURT OF APPEALS OF MARYLAND.

MITCHELL, *J.:*

On the 5th day of May, 1933, John J. Ghingher, then Bank Commissioner of the State of Maryland, was appointed receiver of The People's Banking Company of Smithsburg, hereinafter called the bank, by the Circuit Court for Washington County, Maryland, and assumed charge of the affairs of the bank in accordance with the provisions of Section 9 of Article 11 of the Code of Maryland, as supplemented by Chapter 46 of the Acts of 1933, commonly known as the "Emergency Banking Act," which latter Act took effect on March 4th, 1933.

On June 19th, 1933 a petition was filed by the receiver, which, in substance, set forth that the bank was originally incorporated on January 24th, 1910, under the provisions of Article 11, with a capital stock of $20,000, divided into

2,000 shares of the par value of $10 each; and that on January 13th, 1922, the original articles of incorporation of said institution were amended, whereby the capital stock was increased to the sum of $40,000, divided into 4,000 shares of like par value; all of which stock was outstanding at the time of the filing of the petition.

It was further alleged in the petition, that in the course of the liquidation of the affairs of the defendant bank, the Commissioner had ascertained, with absolute certainty, the existence of a deficiency between its assets and liabilities far in excess of $40,000, representing the approximate par value of the authorized and outstanding capital stock of the institution; and accordingly, it was prayed that an order be passed determining and adjudging that each stockholder of the bank be required to pay to the receiver a sum equal to the par value of the stock held by him; and finally, that the petitioner be authorized and directed to collect, and enforce payment thereof against the stockholders through appropriate legal proceedings.

On the date the petition was filed, the Court passed a summary order decreeing that each stockholder of the bank be required to pay to the receiver an amount equal to the par value of the share or shares of the capital stock of the institution held by him; and authorized and empowered the receiver to collect and enforce payment of the stock liability.

On February 15th, 1935, a petition was filed in the receivership proceedings, by Daniel E. Bachtell and others, in which it was set forth that the petitioners had been made defendants in a separate suit filed in said Court by the receiver on January 28th, 1935, for the purpose of recovering the statutory liability upon stock held by them in said bank.

The petitioners alleged that they had only recently acquired knowledge of the summary order passed against them; that they were advised that said order precluded them, and each of them, from making their respective defense on the merits, and thereby precluded any denial of the need for, or liability of the petitioners upon, the assessment made in the order; and, after setting forth that,

not having been made parties to the suit at the time of the passage of the order, they were taken by surprise, through the attempted enforcement against them, they further alleged as follows:

"That your petitioners are informed, believe and therefore allege that the various debts and liabilities of said The Peoples Banking Company of Smithsburg, Maryland, for the payment of which recovery is sought in the aforementioned equity cause, accrued against said bank at various times over a period of years, and that all of said debts and liabilities did not accrue during the time that all of your petitioners were alleged holders of the stock of said banking company.

"That said order was passed without any allegation or proof that your petitioners held stock in said The Peoples Banking Company of Smithsburg, Maryland, at the time or times when the various debts and liabilities of said banking company accrued against it.

"That said order was passed without any allegation or proof that the various debts and liabilities of said bank accrued during such time or times as your petitioners were alleged holders of stock of said banking company.

"That your petitioners are informed, believe and therefore allege that even though they should be held liable to an assessment for any payment of double liability upon the shares of stock alleged to be held by them, that your said petitioners are, if liable at all, which they do not admit, liable only under the provisions of the banking laws of Maryland, for such debts and liabilities of said bank as accrued during the respective periods during which they may be proved to have held stock therein.

"That the aforesaid order renders your petitioners liable as of course as alleged stockholders of said banking company, and likewise renders them, if liable at all, which your petitioners do not admit, liable for larger sums of money than they; if liable, are required by law to pay.

"That the statutes of Maryland, under and by virtue of which said order of assessment was passed, impair the obligation of contracts, are discriminatory and deprive your

petitioners of equal protection of the law, deprive your petitioners of property without due process of law, and otherwise contravene the provisions of the constitutions of Maryland and of the United States."

Finally, the petition prayed that the aforesaid order, passed on June 19, 1933, be rescinded, and that, in event the prayer for rescission be not granted, the said order be so modified as to permit defendant stockholders in said bank to offer any and all defenses which they, or any of them, might have to the proceeding against them.

Upon the aforegoing petition, a *nisi* order was passed on February 16, 1935, requiring the receiver to show cause why the petition should not be granted.

A second petition to intervene in the proceedings was filed by certain stockholders, alleging, on their part, payment of the assessments against them as stockholders as having been made through inadvertence and mistake and their intention to sue the receiver for the recovery of such payments. Said latter petitioners were, by order of the court passed on February 16, 1935, permitted to become parties to the suit.

On March 6, 1935, the receiver filed his answer to the aforegoing petition of February 15, 1935, in substance denying all the allegations of the petition.

For the purposes of the hearing, a stipulation was filed in the proceedings by counsel for the respective parties, as follows:

"That the times at which the various stockholders of the above named bank acquired their respective share or shares of its capital stock are correctly shown by the stock books of said company, which said stock books this honorable Court shall take and consider as having been duly offered in evidence and proved.

"That at the time of the closing of the aforesaid bank, the various stockholders who are petitioning this Court to strike out the assessment for double liability heretofore made against them, had on deposit in said bank the various sums of money shown on the lists and schedules of de-

posits herewith filed, which said deposits shall be taken as duly proved by competent evidence in this cause.

"That deposits which are now liabilities of said bank and were such at the time of its closing were made and its other liabilities incurred from time to time over a period of years, and that all of its said deposits were not made or its other liabilities incurred during the time that all of its stockholders of record at the time of its closing were such.

"That some of the shares of stock of said bank have been held and owned continuously by the same petitioner or petitioners from before June 1st, 1910, to the present time."

Attached to and forming a part of the stipulation is found a list of stockholders who became such prior to June 1, 1910, and a detailed statement of the respective amounts on deposit in said bank to the credit of the petitioning stockholders.

For the purposes of the hearing, it was admitted: "That without resort to the liabilities of stockholders the total assets of said bank will be insufficient to pay its liabilities to the extent of at least $40,000, and that unless recovery is made from stockholders of this bank, complete liquidation of its assets will leave more than $40,000 of its debts unsatisfied."

After a hearing, the chancellors, on July 31, 1935, passed a decree rescinding the order of June 19, 1933, whereby the receiver was authorized to enforce the liability of stockholders in said bank. The decree, however, was passed "without prejudice to such further proceedings as the receiver may be advised are proper, and in accordance with the opinion filed," which opinion, in substance, limits the respective liability of stockholders at the time of receivership to debts of the bank contracted during the period of such stock ownership. From that decree this appeal is taken.

The chief question presented for our determination, therefore, involves the point of time at which the double liability of a stockholder in a corporation engaged in banking, becomes fixed with respect to such stockholder, to the extent that he may be compelled to contribute his statu-

tory pro rata share towards a fund whence are to be paid, as far as possible, the debts of the corporation; the same being insolvent.

As a preliminary step in such inquiry, a brief retrospect, embracing the legislative and constitutional antecedents of the present law relating to this subject, may tend to assist in its elucidation.

Today, banks and trust companies in this state are governed by the same statutes. Earlier, the two classes of corporations were legislated upon under separate articles in the Code, one dealing with "Banks" and the other with "Corporations." Still earlier, so far as stockholders' liability is concerned, banks alone were subject to this protective provision for the benefit of creditors of such institutions. And farther yet in the past, upon the failure of a bank, its stockholders lost only what money they had actually invested, and could not be compelled to make up any deficiency that might develop in the final settlement of the bank's affairs.

Specifically, then, prior to the adoption of the Maryland Constitution of 1851, bank stockholders, in case of bank failure, were not liable to contribute to any one any part of the deficit represented by the bank's unpaid debts.

By the Constitution of 1851 (article 3, section 45), stockholders in new or rechartered banks were made liable, in the event of corporate insolvency, "to the amount of their respective share or shares of stock," in satisfaction of the bank's creditors.

The Constitution of 1864 (article 3, section 38) made no material change in this provision; none was made in the 1867 Constitution; and section 39 of article 3 now reads: "The General Assembly shall grant no charter for Banking purposes, nor renew any Banking Corporation now in existence, except upon the condition that the Stockholders shall be liable to the amount of their respective share or shares of stock in such Banking Institution, for all its debts and liabilities upon note, bill or otherwise; the books, papers and accounts of all Banks shall be open to inspection under such regulations as may be prescribed by law."

In 1868 the Legislature, by chapter 471, section 61 (now section 76, art. 23, Code), clarified the status of executors,

trustees, and similar persons holding stock for others, as to the effect of any liability thereon.

In 1892, by chapter 109, the Legislature added new sections to the "Corporations" article of the Code, one of which, section 85L of article 23, imposed liability for corporate debts upon stockholders in safe deposit, trust, and loan companies. Certain other corporations were also included, but subsequently eliminated. Members of a partnership being potentially liable for partnership debts to the extent of all they possessed, if required, and stockholders in banks being doubly liable in case of corporate insolvency, the Legislature evidently deemed it not inequitable that some such provision should be made to cover the class of stockholders named; and, accordingly, imposing a less onerous burden than that borne by partners but heavier than that of bank stockholders, it first fixed the liability of stockholders in safe deposit, trust, and loan companies at double the value of the stock owned, which, together with the amount of investment in stock, in reality was "triple liability."

Later, in 1904, by chapter 101, amending the Act of 1892, the liability of such investors was limited to an amount equal to the par value of the stock owned, thereby reducing the so-called "triple liability" to the present "double liability," the same as in the case of stockholders in banking corporations. And, under its provisions, the receiver of an insolvent corporation was clothed with authority to enforce the double liability of its stockholders. This enactment effected a change in the remedy of creditors in that prior thereto the claims of creditors had been enforced by an individual suit against a stockholder. The new law made the receiver, representing the interests of the corporation, as well as all its creditors, the proper party to initiate proceedings against all the stockholders for the enforcement of their statutory liability.

This was the situation at the beginning of 1908; and in that year chapter 153 was enacted, making minor changes in the act of 1904. At the same session, the Legislature, by chapter 240, section 40, added new language to the act of 1868, declaring that, except in the case of banks, for

which provision was made in the Constitution (section 39, art. 3), and except as provided elsewhere in the "Corporations" article (e.g., section 147, relating to trust, etc., companies, and section 77, requiring stockholders to complete payments on stock subscriptions, in certain contingencies), no stockholder should be held liable for corporate debts. The effect of this act was to make clear that the act of 1892 did not apply to banks, and to point to the Constitution as the source of bank stockholders' liability.

In 1910, by chapter 219, the Legislature revised the "Banks" article of the Code, repealed such of the provisions of the "Corporations" article as applied to trust companies, and, combining them with the bank provisions, changed the title of article 11 from "Banks" to "Banks and Trust Companies."

By virtue of this coalescence of statutes, the receiver of a bank, for the first time, was empowered to enforce the liability of its stockholders, collecting their contribution to the common fund, from which he would make distribution to the bank's creditors.

In view of the inauguration of this new system of liability enforcement, involving a change in the theories of recovery and a corresponding modification of the rules of evidence, the cases which had been decided during the existence of the old practice were no longer controlling.

True, the statutes construed in those cases, while then relating to corporations other than banks, have since become part of the banking laws. But the court was there considering an original legislative enactment, pure and simple, lacking any specific constitutional background, and was therefore bound to construe the same according to the principles of statutory construction.

The present law upon the subject of stockholders' liability being the same in the case of banks as in the case of trust companies, it might be argued that the trust company law having been construed before it became a part of the bank law, the effect of combining the trust company law with, and making it a part of, the bank law, should, under the doctrine of *stare decisis,* make mandatory the accept-

ance of prior judicial construction, in cases involving banks.

But it must be recalled that the trust company law dates from 1892, its receivership feature dates from 1904, and it was merged with the banking law in 1910. The law of 1910, so far as it related to banks, was but an amplified restatement of the constitutional provision, detailing in a legislative act an axiom of the organic law of the state which had existed for nearly sixty years before the Legislature placed it in the Code.

Therefore the analogy falls, for the reason that we have before us, not a simple act of Legislature, and, as such, open to construction under the rules of statutory interpretation, but, in reality, a basic provision of the State Constitution, as amplified in administrative detail by a subsequent act of the law-making body of this state.

The question, then, being one of constitutional and not statutory construction, and finding no case in which this section has been previously expounded, it is presented as one of first impression. Viewed in that aspect, the controlling force in its adjudication must be developed from an inquiry into the underlying purpose sought to be accomplished by its terms. One quickly concludes that purpose to be the protection of bank creditors. The debates of the Maryland Consitutional Convention of 1864, when this section (section 39, art. 3) was under discussion with a view to amendment, are affirmatively illuminating upon this point.

The object being apparent, and a doubt arising as to the method of its accomplishment, the resolution of that doubt depends upon the answer to the inquiry: Of a number of possible interpretations, which is best calculated to insure the rights of creditors and at the same time operate the least harshly upon those who must bear the burden of liability?

In the case at bar, two courses lie open:

(a) To hold liable all persons owning stock at the time when it first becomes apparent that the bank's normal assets are insufficient to meet its obligations and the first step is taken to enforce stockholders' liability.

(b) To hold liable those who owned stock at the times when the various transactions took place out of which arose the liabilities existing at the time of insolvency.

Arguments advocating either course are fraught with possibilities of inequity, injustice, and hardship upon someone.

The theory of holding former stockholders liable arose as a matter of necessity, in order to prevent a failure of the remedy made mandatory by the Constitution.

Originally, the enforcement of the double liability of bank stockholders presented some difficulty. The creditor was entitled to assert his claim, and the stockholder was bound to fulfill his obligation under the Constitution. This liability not being an asset of the bank, in the sense that the bank itself could collect from him, it became apparent that the creditor must proceed directly against the individual stockholder.

There was no actual contract, in the first instance, between stockholder and creditor; the contract being tangibly between the stockholder and the bank. Therefore, the creditor having a right of action and a source of liability from which his claim eventually was entitled to be satisfied, and the Constitution being silent as to the method of its enforcement, the law created the fiction of a contract between the creditor and the stockholder, for the purpose of enabling a suit, the result of which would be a fulfillment of the constitutional guaranty established for the protection of the public in its dealings with institutions chartered by the state to conduct a banking business.

The suit being brought upon this fictional contract, the trial thereof became subject to the rules of evidence in cases of contract; and, as a natural and logical consequence, the defendant could not be held liable for any claims against him which accrued at a time prior to his assuming the relation to the bank out of which arose the liability sought to be enforced. The courts felt bound to reject claims which did not arise during the period of stockholdership of the defendant; and from the numerous cases which were decided upon the basis of this principle, the doctrine of absolute nonliability of bank stockholders for debts occur-

ring at a time when they did not occupy that relation to the bank came to be considered the settled law of this state in suits by creditors against individual stockholders.

It will be observed, however, that the Constitution does not fix the maximum liability to which stockholders in a banking institution, organized under the authority thereof, may be subjected; it does, though, fix the minimum liability of such stockholder, which, under its mandate, shall be "to the amount of their respective share or shares of stock in such banking institution, for all its debts and liabilities upon note, bill or otherwise." Nor does it limit the liability of stockholders to such debts as may have been incurred by the bank during the respective period of stock-ownership. It creates a liability, as an incident to stock-ownership in a banking corporation, for all its debts; and it is nowhere apparent that it was the intention of the framers of the Constitution to place upon creditors of an insolvent bank, or upon a receiver of its affairs, the insurmountable burden of proving, from day to day, and perhaps over a long period of years, the exact financial status of a banking corporation, as a condition precedent to the recovery of liability.

As we have observed, over a long period of years the Legislature took no affirmative action upon the constitutional provision, and meanwhile courts were left to deal with that provision without statutory amplifications. But, since the Legislature of 1910, in the exercise of its inherent authority, enacted chapter 219, now found in the Code under section 72 of article 11, courts of this state must deal with the original constitutional provision in the light of the legislative enactment, and, whenever the latter is not in conflict with the former, their plain duty is to give full force and effect to the statute. That statute is explicit and mandatory. It provides: "Stockholders of every bank and trust company shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of every such corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock. * * * And the liablity of such stockholders shall

be an asset of the corporation for the benefit ratably of all the depositors and creditors of any such corporation, if necessary to pay the debts of such corporation."

Construing the quoted portion of the aforegoing statute, and giving to the words used therein the ordinary acceptation of their meaning we must conclude that "stockholders" naturally mean those who are such at the time it becomes necessary to enforce liability. It cannot mean those who formerly held stock, because such persons ceased to be stockholders upon the assignment of their stock. Such a construction is not only reasonable, but it is fortified when applied in connection with Section 71M of the Emergency Banking Act of 1933, which, apparently being predicated upon the theory that liability of the transferor ceased upon the ordinary bona fide transfer of bank stock, especially provided as follows: "Nothing contained in this Act shall be construed to relieve any stockholder of record in any banking institution at the time of the passage of this Act, from the liability imposed by Section 72 of this Article. Any person who may be a stockholder at the commencement of said period of custody and the subsequent transferee of record of said stock at the time the statutory liability for assessment shall become enforceable, shall be jointly and severally liable to the receiver for the statutory assessment on said shares. The rights of indemnity and exoneration as between a stockholder as of the date of the beginning of said custody and his transferee and between subsequent transferees during said period shall not be affected by this provision, but the liability of such transferor shall terminate whenever the custody of the Bank Commissioner shall cease by reason of the exemption of the banking institution whose stock is so transferred, from the provisions of this Act as hereinbefore provided in Section 71A, or upon the cessation of the Bank Commissioner's custody by the expiration of the time limited in said section, whichever shall first occur."

Again, it must be remembered that the statute provides that the stockholders' liability shall be an asset of the corporation for the benefit of all the creditors and depositors, if and when necessary to pay its debts. This language does

not refer to persons who may have been creditors but are not now, but to those who are creditors now, and to all of them, regardless of when their rights accrued in relation to stock ownership.

One can readily visualize the vast detail of bookkeeping, the labyrinth of accounting, in which such proceedings might well become enmeshed, as a result of attempting to ascertain what were the precise liabilities of various stockholders over a period of years, involving a stupendous quantity of petty transactions and a review of many thousands of items found among the records of a bank, in an effort to determine the exact degree of liability of a particular defendant. Indeed, before the act of 1910, Judge Boyd, in *Murphy* v. *Wheatley*, 102 Md. 501, 515, 63 A. 62, reluctantly adhering to the old theory, based upon the fiction of a contract between creditor and stockholder, commented upon the regrettable consequences necessarily flowing therefrom.

But, when the act of 1910 merged the trust company law with the bank law and gave the bank receiver the power to enforce double liability against stockholders and make distribution to creditors, it swept away the fictional contract previously found necessary in order to achieve the object of the constitutional guaranty; and, the right of action no longer being one of the creditor in person against an individual stockholder but of the receiver against all the stockholders, a different theory of recovery was proper to be invoked.

In other words, the contract of the stockholder with the bank, not being a purely voluntary one, but being imposed upon him by the Constitution, was not to be restricted to such a narrow interpretation as that required when the suit was a personal one between the creditor and the stockholder. Under the fictional contract, the stockholder could be strictly held to nothing beyond the pale of his actual period of possession of the stock. Under the absolute contract between the stockholder and the bank, springing from the constitutional provision, his liability was a broad one, and included the debts of the bank as and when they reached the stage of enforceable claims against the bank,

regardless of the time when the particular transaction out of which the claim arose, had its inception.

The logic runs thus: The Constitution says the stockholder shall be liable for the bank's liabilities; he shall be liable when the bank is liable; his liability is concurrent with that of the bank. He shall be called upon to pay, when the bank is called upon. If the bank is never called upon, then his potential liability dies. If it is called upon, by reason of a liability ripening into an active claim, then the quiescent liability of the stockholder is quickened into life and his obligation to contribute becomes fixed and definite.

The statute, amplifying the Constitution, says such liability shall be an asset of the bank for the benefit of its creditors, if necessary to pay its debts. Therefore, until necessity demands, such liability remains in suspension, covering the entire body of stockholders, and, when invoked, it attaches to the stockholders; that is, those holding stock in the bank at the time of such invocation.

The adoption of this interpretation is susceptible of least criticism from the standpoint of justice and equity, and is more nearly in accord with that certainty and simplicity which should accompany the administration of law.

To hold the contrary view would engulf all concerned in a swirling flood of litigation, so lengthy, so tedious, and so costly that ultimately the inconclusive and discouraging nature of resort thereto would defeat the very end sought to be achieved by the basic law.

A further contention is made that, with respect to stockholders who were such before the act of 1910 took effect, their liability is still governed by the law as it stood before 1910, leaving them subject to suits by individual creditors for the enforcement of their claims, and that, so far as the act of 1910 is attempted to be enforced in that respect, it is unconstitutional, in that it takes away a remedy previously enjoyed by such creditors. But, in the view we have taken, the liability of a stockholder does not become enforceable until the bank's inability to pay the creditors is manifest; and, as the record indicates that such a contingency did not arise in the present case until long after

the passage of the act of 1910, there can be no force in this argument. Furthermore, even had the Legislature not reserved existing rights, as it did in that act, it is well settled that no one has a vested right in a remedy, and that the Legislature may change a legal remedy, so long as the one substituted is equally effective in coercive force with the one repealed. *Baltimore & O. R. Co.* v. *Maughlin*, 153 Md. 367, 138 A. 334.

In view of the broader field of contention between the respective parties to this suit, the question of the right of a depositor stockholder to set off his credit as a depositor of the bank against his liability as a stockholder of the bank, was not pressed in the argument before this Court. But, inasmuch as that question was referred to and dealt with in the carefully prepared opinion of the lower court, we deem it proper to dispose of it here.

In *Cahill* v. *Original Big Gun Ass'n*, 94 Md. 353, 50 A. 1044, 1045, 89 Am. St. Rep. 434, it is said: "The liability of the stockholder, then, under the statute, having been settled as a debt due from the stockholder to the creditor, there can be no valid reason, it seems to us, why a stockholder who is also a creditor should not be entitled, as a matter of equity, to set up as an equitable defense the debt of the bank to him against his own liability. Mr. Cooke, in his book on Corporations (section 225), says: 'It has been held that, where the statute creates a fund out of which the creditors are to be paid ratably, then the stockholder cannot set off an indebtedness of the corporation to him. He must pay in what the statute requires, and then prove his claim against the corporation like any other creditor. But where the shareholder's liability by statute is immediate and personal and several, and any creditor may sue any shareholder, then the shareholder may set off a debt owing to him from the corporation, when he is sued by a corporate creditor.' In Beach, Priv. Corp. section 727, it is said: 'But if the statute imposes upon shareholders a personal liability to creditors, immediate and several, so that any creditor may institute an independent action against any shareholder for the enforcement of corporate debts, then a defendant shareholder may set off debts due from the company to himself.' In Tayl. Priv. Corp. section 732, it is

thus stated: 'When a single creditor can and does sue a shareholder at law to enforce the statutory liability of the latter, it is then competent for the shareholder to set off a debt owing him from the corporation.'"

The case from which the above quotation is taken is cited in the opinion of the lower court in justification of its favorable ruling for the allowance of a depositor stockholder's set-off in the instant case. We cannot agree with that conclusion (a) because we are not here dealing with a corporation charter which, as in the cited case, specifically provided that "The continuance of this corporation shall be on the condition that the stockholders and directors of this corporation shall be liable to the amount of their respective share or shares of stock in this corporation for all its debts and liabilities upon note, bill or otherwise"; and (b) because that decision was rendered prior to the passage of the act of 1910 definitely declaring the liability of all stockholders to be an asset of the corporation, for the use and benefit of all creditors alike.

In *Poe on Pl. & Pr.*, vol. 1, section 613, it is said: "A set-off, technically, means a cross claim, and is confined to mutual debts between the plaintiff and defendant. * * * To entitle the defendant to make such a defense, he must not only have a right to receive the amount due him from the plaintiff, but his claim must be of such a nature that he can sue for and recover it in a court of law. * * * And it may be stated, in general terms, that to authorize a set-off, the debts must be mutual, must be between the parties in their own rights, must be of the same kind and quality, and be certain and clearly ascertained or liquidated."

Applying the above fundamental principles to the facts in the instant case, we are unable to differentiate between stockholders who are depositors and stockholders who are not. The former class stand in the dual capacity of debtors and creditors of the involved corporation, and should be so dealt with in the liquidation of its affairs.

For the reasons stated, the decree below will be reversed, and the cause remanded for further proceedings in accordance with this opinion.

Decree reversed, and cause remanded, with costs to the appellant.

IN THE COURT OF APPEALS OF MARYLAND

OCTOBER TERM, 1935

GENERAL DOCKET

No. 62

JOHN J. GHINGHER, BANK COMMISSIONER, RECEIVER FOR THE HAGERSTOWN BANK AND TRUST COMPANY,

vs.

STOCKHOLDERS OF HAGERSTOWN BANK AND TRUST COMPANY, A BODY CORPORATE.

Per CURIAM:

In this case, on facts similar to those stated in the opinion filed in the case of Ghingher, Receiver, *v.* Stockholders of the People's Banking Company of Smithsburg, 182 A. 558, the same questions of law have been presented, and the conclusions are necessarily the same.

For the reasons stated in that opinion, therefore, the decree below will be reversed, and the cause remanded for further proceedings in accordance with that opinion.

Decree reversed, and cause remanded, with costs to the appellant.

(8128-C)